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No. 87-2098

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal From The United States District Court
For The Northern District Of Oklahoma

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-41 (to be codified at 49 U.S.C. § 1682a)—in which Congress has instructed the Secretary of Transportation to raise revenue sufficient to cover all the costs associated with administering the Department of Transportation's pipeline regulatory programs—represents an unconstitutional delegation of the taxing power.

(i)

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States District Court for the Northern District of Oklahoma were: (1) Mid-America Pipeline Company ("Mid-America"),¹ plaintiff below and appellee herein; and (2) the Secretary of Transportation ("the Secretary"),² defendant below and appellant herein. At all times, the Secretary has been represented both by Department of Justice counsel and by counsel from the Department of Transportation ("DOT").

¹ Appellee Mid-America Pipeline Company is a wholly owned, second-tier subsidiary of MAPCO Inc. Neither Mid-America Pipeline Company nor MAPCO Inc. have affiliate or subsidiary companies (other than wholly owned subsidiaries). This statement is furnished pursuant to Rule 28.1 of the Supreme Court Rules.

² At the time this lawsuit was initiated, and throughout the district court proceedings below, Elizabeth H. Dole was Secretary of Transportation. Accordingly, she was the named representative defendant in the district court. Subsequently, Ms. Dole resigned as Secretary and was replaced by James H. Burnley IV, the named representative appellant in this Court.

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MID-AMERICA PIPELINE COMPANY,
Appellee.

**On Appeal From The United States District Court
For The Northern District Of Oklahoma**

MOTION TO AFFIRM

Appellee Mid-America Pipeline Company hereby moves the Court to affirm the judgment of the district court that Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, 100 Stat. 82, 140, is an unconstitutional delegation of Congress' power to tax. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974)—when read against the text and history of Article I of the Constitution—mandate the conclusion that Congress may not delegate the taxing power to an administrative agency in the manner attempted in

Section 7005 of COBRA. For this reason, the judgment below should be affirmed.

Mid-America acknowledges that the question presented by this case is substantial in the jurisdictional sense. As the Government correctly notes, although Section 7005 of COBRA may have been the first occasion on which Congress sought to transfer revenue-raising (taxing) authority to an administrative agency, it has not been the last: the Legislature has recently employed at least one similar legislative device with respect to the Federal Energy Regulatory Commission.¹ The precise constitutional limits of this doubtful practice of assigning to agencies the responsibility of making the difficult tax policy choices that have historically been made only by Congress is a question upon which this Court should pass.

COUNTERSTATEMENT OF FACTS

1. Section 7005 of COBRA, signed into law on April 7, 1986, authorizes the Department of Transportation to raise revenue from companies within its jurisdiction for the purpose of financing the Department's entire pipeline regulatory program. Specifically, Section 7005 authorizes the Secretary to establish a "fee schedule" by calculating and imposing annual assessments on oil pipelines sufficient to cover all costs associated with DOT's pipeline programs.² In Section 7005, however, Congress has

¹ See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-91 (granting the Federal Energy Regulatory Commission the power to assess "annual charges" to recover the entire costs of its regulatory activities). Mid-America's constitutional challenge to this statute is currently pending in Oklahoma federal district court, *Mid-America Pipeline Co. v. FERC*, No. 87-C-571B (N.D. Okla.).

² The regulatory programs in question are the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) § 2001

neither set the level of these charges itself nor suggested a formula pursuant to which the Secretary is to set the charges. Rather, the Secretary is directed to devise a schedule of assessments, "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." Section 7005(a)(1). These *taxes*—which is what they clearly are under the criteria of *National Cable*, *supra*—are to be imposed against all persons operating pipeline facilities subject to either of the two pipeline programs.

2. The costs which Section 7005 assessments are designed to recoup encompass *all* costs associated with these federal pipeline programs. H. R. Rep. No. 453, 99th Cong., 1st Sess. 440 (1985). They include management, overhead and administrative costs; the costs of funding a grants-in-aid program to the States; the costs of collecting the charges themselves; the costs of bringing civil and criminal prosecutions against pipeline companies; as well as a range of other costs that also bear no connection with any benefits or service that the Department confers on pipelines.

3. DOT published a notice in the *Federal Register* on July 16, 1986, announcing that it had determined that Section 7005 charges would be assessed against individual pipelines on the basis of total pipeline miles, and that an assessment of \$6.41 per pipeline mile would reimburse DOT for its costs of regulation for fiscal year 1986. 51 Fed. Reg. 25782 (1986). Although DOT subsequently acknowledged that "there are good arguments in favor of using volume-miles rather than mileage as an assessment basis," it nevertheless chose total mileage as the basis

et seq., and the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) § 1671 *et seq.* These programs establish a regime of regulatory standards which are enforced through a system of inspections; violation of DOT regulations may subject a pipeline to a range of civil and criminal prosecutions and penalties.

for its assessments primarily because it was "simple to administer." 51 Fed. Reg. 46978 (1986).

4. Mid-America Pipeline Company is a Tulsa-based company whose pipelines transport liquids subject to regulation under the Hazardous Pipeline Safety Act. Mid-America, like the other pipelines regulated by DOT pursuant to these regulatory programs, is not dependent in any way on the agency for permission to operate. Nor has Mid-America ever requested any service from DOT in exchange for which Section 7005 charges have been exacted.

5. On July 28, 1986, DOT issued a notice of assessment to Mid-America demanding payment of \$53,023.52. Mid-America paid that sum under protest. This action was filed in the United States District Court for the Northern District of Oklahoma on September 4, 1986. Mid-America and the Government filed cross-motions for summary judgment.

6. The district court adopted the Findings and Recommendations of the magistrate to whom it had assigned the motions and held Section 7005 to be an unlawful delegation of Congress' power to tax. *See Appendix to Jurisdictional Statement at 1a-13a.*

ARGUMENT

This case presents the question whether, and under what standards, Congress may delegate the taxing power to an Executive Department. The Government argues that congressional delegations of the power to tax are subject to precisely the same deferential standards as are delegations of ordinary legislative power, and thus, that Congress is virtually unconstrained in its ability to delegate taxing authority to the Executive. That view, we suggest, cannot be squared with Article I of the Constitution and the historical practice of Congress in exercising the taxing authority; nor can it be reconciled with the prior decisions of this Court limiting, in light of such constitutional considerations, congressional delegations of revenue-raising power to administrative agencies. See *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). On the contrary, the Constitution and its history demonstrate that the inherently discretionary and highly political task of levying taxes is a uniquely legislative function that Congress cannot freely assign to the Executive Branch, at least not without narrowly circumscribing the scope of the Executive's exercise of delegated power.

The source of this constitutional limitation may be traced directly to the Framers' concerns that the taxing power be immediately responsive to the political process. For this reason, the Constitution not only assigns the taxing authority to Congress generally, but sets forth a specific *process* by which the Legislature shall channel the exercise of that power. The Constitution entrusts to the House of Representatives—the House of Congress whose members are most directly and most frequently answerable to the electorate—all responsibility to originate the "bills," giving rise to the statutes, that impose taxes on the people. U.S. Const., art. I, § 7, cl. 1. Historically, Congress has been faithful to this obligation

and has not attempted to abdicate the difficult political choices presented by questions of taxation.

Congress' specific delegation of expanded revenue-raising power to the Executive Branch in Section 7005 of COBRA marks a significant, indeed dramatic, departure from this historical practice and these constitutional restraints. Section 7005 assigns to a federal agency the task of raising revenue to support certain of that agency's own regulatory activities. Within certain broad parameters, however, Section 7005 leaves to the Executive agency the basic tax writing decisions as to which taxpayer to tax, and what tax rate to apply to each. As such, Section 7005 is not merely a "fee" statute that directs an Executive Department to perform the limited function of formulating fees that will reflect the cost of providing specific, requested services that might be charged to those requesting the agency's services. Rather, Section 7005 leaves to the Executive the determination of how best to raise sufficient revenue to cover the costs of its regulatory efforts, with no expression of congressional policy to guide the agency in picking, in multiple choice fashion, among various suggested methods in assessing the tax. Recognizing that such a legislative device is both unprecedented and contrary to this Court's previous decisions, the lower court declared Section 7005 invalid. That judgment should be affirmed.

1. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974), clearly imply constitutional limits on Congress' ability to delegate the taxing power. In these cases, the Court was faced with attempts by the Federal Communications Commission ("FCC") and the Federal Power Commission ("FPC") to recoup the costs of their regulatory activities by imposing assessments against those entities within the agencies' jurisdiction. Relying on the Independent Offices Appropriation Act ("IOAA"), 1952, 31 U.S.C. § 9701—

which purportedly authorized agencies to assess fees that were "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ."—the FCC and FPC developed fee schedules designed to make the agencies economically self-sufficient.³ These fees were structured so as to charge regulated entities not only for benefits bestowed by the agency on these entities but also for protective services rendered to the public. See *National Cable*, 415 U.S. at 341; *New England Power*, 415 U.S. at 348-49.

In striking down these fee schedules, the Court held in *National Cable* that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." *Id.* at 341. The Court emphasized the vast difference between allowing an agency to set "fees," based on the "value to the recipient" of whatever agency services are performed, and permitting an agency to take into account "public policy or interest served, and other pertinent facts," where one enters into the realm of taxation, historically reserved to Congress.

The addition of "public policy or interest served, and other pertinent facts," if read literally, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

Id. at 341. Because "[t]axation is a legislative function" and "Congress [] is the sole organ for levying taxes," (*id.* at 340), the Court refused to read the IOAA as

³ In the case of the FCC in *National Cable*, this was done at Congress' direction, but was nevertheless rejected by this Court. See 415 U.S. at 339 (quoting H.R. Rep. No. 91-316, pp. 7-8, and H.R. Conf. Rep. No. 91-647, p. 6, where it was stated: "The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.")

bestowing on a federal agency the taxing power. *Id.* at 341.

To be sure, the Court in *National Cable* did not reach the constitutional question whether, or under what standards, Congress may delegate the taxing power. Rather, the Court narrowly construed the IOAA so as to avoid "constitutional problems" and "the hurdles revealed in [*Schechter*⁴ and *Hampton*⁵]." *Id.* at 342. Nevertheless, the decision must be read to support the proposition that Congress may not freely delegate the taxing authority to the Executive Branch. The Court declined to give effect to seemingly unambiguous statutory language, effectively reading that language out of the statute, expressly on the grounds of constitutional concerns. Such a drastic interpretative measure was required, presumably, only in the face of a significant constitutional obstacle. Cf. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'").

National Cable and *New England Power* have been consistently applied by the federal appellate courts as a constitutional limitation on the exercise of the taxing authority by the Executive.⁶ See *Sohio Transportation Co. v.*

⁴ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down portions of the National Industrial Recovery Act of 1933 as unconstitutionally delegating the power to enact legislation). By specifically citing *Schechter* and refusing to rule out its applicability, the Court expressly acknowledged the continuing viability of the nondelegation doctrine as applied at least in the tax area.

⁵ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (upholding statute giving the Executive authority to adjust tariffs previously established by Congress in light of changing circumstances on the ground that Congress had set forth a sufficiently "intelligible principle" to guide the President).

⁶ The federal courts have applied the constitutional standard implicit in *National Cable's* interpretation of the IOAA to other acts purporting to delegate revenue-raising power to administrative

United States, 766 F.2d 499, 503 (Fed. Cir. 1985) (*National Cable* is premised on the recognition that it would be "an unconstitutional delegation of Congress' exclusive power to tax" for agencies to be allowed to impose charges to recover expenditures for the public interest); *Central & Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985) (under *National Cable*, federal agencies are prohibited from assessing fees in order to recover the full costs of regulation because such charges are "more conceptually akin to taxes, which could, of course, be levied only by Congress"); *National Ass'n of Broadcasters v. Federal Communications Comm'n*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976) (*National Cable*, "as part of the basis for its opinion, relied on Art. I, § 1 and § 8, par. 18 of the Constitution in holding that taxation is an essential legislative function that Congress cannot 'abdicate or transfer to others.'"); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 (1st Cir. 1982) (*National Cable* made clear that "taxes . . . may only be levied by Congress"); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 227 (5th Cir. 1979) (*National Cable* construed the IOAA narrowly so as not to "offend the constitutional mandate that only Congress has the 'Power to levy and collect Taxes'"), cert. denied, 444 U.S. 1102 (1980); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929 (10th Cir. 1983)

agencies. See *Sohio Transportation Co. v. United States*, 766 F.2d 499, 502-04 (Fed. Cir. 1985) (applying *National Cable* to a revenue-raising delegation in the Mineral Leasing Act); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929-33 (10th Cir. 1983) (applying *National Cable* to a revenue-raising delegation in the Federal Land Policy and Management Act); *Alumet v. Andrus*, 607 F.2d 911, 916 (10th Cir. 1979) (same); *City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977) (applying *National Cable* to a revenue-raising delegation in the Federal Water Power Act), cert. denied, 439 U.S. 818 (1978); *Alaskan Arctic Gas Pipeline Co. v. United States*, 9 Cl. Ct. 723, 738-39 (1986) (same), aff'd, 831 F.2d 1043 (Fed. Cir. 1987).

("The Court said that assessing industry members for the costs of oversight over the entire industry would require the members to pay 'not only for benefits they received but for the protective services rendered the public by the Commission' in its regulatory role, and suggested that such an assessment might be an unconstitutional tax"). *But see Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988).⁷

2. The Constitution assigns the power to levy taxes solely to Congress for reasons that are readily apparent from our revolutionary heritage and that were voiced frequently during the debates that culminated in the drafting of the Constitution. The Framers' concerns that taxation be directly and immediately responsive to the political process and to the popular will are embedded in the constitutional text, which not only assigns the taxing power to the Legislative Branch generally, but sets forth a specific *process* by which the Legislature shall channel the exercise of that power. The taxing

⁷ The Government seriously overstates matters when it contends that the district court's decision here is in conflict with *Florida Power & Light*. The delegation at issue in that case—Congress' instruction to the Nuclear Regulatory Commission ("NRC") to recover 33% of the costs of nuclear power plant licensing and inspection programs through a system of fees (*see COBRA § 7601(a)*, 100 Stat. 146-47)—was far narrower and much more akin to a traditional fee than that involved here. Much as this Court prescribed in *National Cable*, the delegation in Section 7601 was constrained by two specific statutory directions absent here: annual charges had to be (1) "reasonably related to the regulatory service provided by the Commission" and (2) "fairly reflect the cost to the Commission of providing such service." 846 F.2d at 775. In addition, Congress directed the NRC only to recover a third, not all, of its regulatory costs. These factors are crucial because the thirty-three percent of its budget that the NRC could recover under Section 7601 was related—in the view of Congress—to the services that the agency provided the industry. The agency's levy, therefore, was an approximation of the cost of services rendered in a manner closely akin to determinations involved in applying the IOAA.

power, first among the enumerated powers of the National Government, is expressly placed in the hands of the Legislature: “[t]he Congress shall have Power to lay and collect Taxes. . . .” U.S. Const., art. I, § 8, cl. 1. No similar or overlapping power is granted to the Executive. The Constitution requires that “[a]ll Bills for raising Revenue shall originate in the House of Representatives . . . ,” (*id.*, art. I, § 7, cl. 1), the House where the number of representatives is proportionate to the number of taxpayers in each state, (*see id.*, art. I, § 2, cl. 1, 3), and whose members are all elected for two-year terms, making them immediately accountable to the political process and their constituents. *See id.*, art. I, § 2, cl. 1. Thus, the Framers intended that questions of taxation be (1) part of the legislative process, to be addressed through statutes, and (2) that legislators, notably those in the House, be immediately accountable for the taxing decisions they made in initiating a revenue-raising provision. At a minimum, to permit taxation by an administrative agency would be to render nugatory the textual requirement that revenue be raised by *bills* (not by agency rules) and that those bills originate in the *House of Representatives* (not in an informal rulemaking proceeding).

These constitutional requirements reflect, of course, the concern of the Framers that, of the legislative powers, the power to tax is peculiarly susceptible to abuse.⁸ The historical record is replete with references to the inherent dangerousness of the taxing power and for the need to keep it in the hands of a representative body.⁹ Accord-

⁸ Indeed, the subject of how to constrain the exercise of this power was one of the most sharply debated controversies raised at the Constitutional Convention. *See C. Burdick, The Law of the American Constitution: Its Origins and Development* 155 (1922).

⁹ *See, e.g., The Federalist No. 10* (Hamilton) (“there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice”); *The Federalist No. 48* (Madison) (“The legislative department

ingly, this Court has long acknowledged that the mechanism for curbing abuse of the taxing power lies in maintaining a proper separation of powers. As Chief Justice Marshall observed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) :

The only security against the abuse of this power is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

Id. at 428 (emphasis added).¹⁰

For these reasons, among others, the Government's assertion (Jurisdictional Statement at 10-11) that there is no basis in the Constitution's text or in this Court's decisions for prohibiting delegations of the taxing power, or at least holding them to a higher standard of scrutiny, is plainly incorrect.¹¹

alone has access to the pockets of the people"); 5 J. Elliot, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* 284 (2nd ed. 1887) (statement of Benjamin Franklin) ("[I]t was always of importance that the people know who had disposed of their money, and how it had been disposed of . . .").

¹⁰ Later in the opinion, Chief Justice Marshall echoed the Framers' concerns when he observed that "the power to tax involves the power to destroy." *Id.* at 431. That comment, of course, was what prompted Justice Holmes' famous reply: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion).

¹¹ In one of the earliest cases dealing with the issue of delegated authority, the Court suggested that there are some areas which are so central to the legislative function that they may not be delegated: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wh.) 1, 43 (1825) (Marshall, C.J.). Indeed, certain legislative powers are obviously non-delegable or delegable

3. To permit an Executive Department to exercise the power to tax at the same time it enjoys expansive latitude in connection with the power to spend is to invite the sort of concentration of power that our constitutional structure was designed to avoid. A federal agency that has the authority and discretion to fund its activities by establishing its own program of taxation has little incentive to exercise responsible restraint over its spending or to vindicate its revenue demands before Congress.

4. Taxing decisions involve, in the first instance, highly discretionary distributive issues as to which entity or class of entities is best placed to bear the taxing burden, and on what basis such a burden may be "fairly" allocated. In addition, it has long been recognized that "a tax is a powerful regulatory device" since through it "a legislature can discourage or eliminate a particular ac-

only under particularly strict standards. See L. Tribe, *American Constitutional Law* 362 (2nd ed. 1988) ("certain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility"). Like the taxing power, these other powers that are either non-delegable, or severely limited in delegability, tend to be supported in the Constitution not merely with an assignment of power to Congress but, in addition, a textual description of the mechanics of its exercise.

Consider, for example, the power of Congress to impeach and convict a President for "Treason, Bribery, or other High Crimes and Misdemeanors." U.S. Const., art. II, § 4. As Dean Freedman explains:

The Framers regarded the institution of impeachment as pre-eminently a political process, likely to agitate the passions of the whole community. It was, as Hamilton wrote in *The Federalist*, "a method of NATIONAL INQUEST into the conduct of public men," best assigned to "the representatives of the nation themselves."

J. Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326-27 (1976) (citations omitted). As discussed briefly below, many of these same considerations of institutional competence argue in favor of according the taxing power qualitatively different treatment under the delegation doctrine.

tivity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise." *Massachusetts v. United States*, 435 U.S. 444, 455-56 (1978). Taxing determinations are both highly political and inherently discretionary, and hence not susceptible to ordinary methods of judicial review. For this reason, the power to tax has historically been regarded as non-delegable within our constitutional scheme:

The same discretionary character of taxation that ordinarily shields it from effective judicial review would also make legislative oversight of a delegate difficult. Therefore, it seems likely that the taxation power, if it is to be exercised legitimately, may be exercised only by Congress.

L. Tribe, *American Constitutional Law* 366 n.15 (2nd ed. 1988) (citing *National Cable*).

Thus, it is not surprising that the Constitution vests the Legislature with the obligation of exercising the taxing power because the Legislature is the national institution that takes its character most directly from the *political responsiveness* of its members. Congress is, in short, accountable through the political process for its tax policy choices in a way that agency officials are not. As Dean Freedman elaborates in his assessment of *National Cable*:

Because no other institution of the federal government except Congress possesses the unique characteristics that the Framers relied upon to provide citizens with an institutional security against unfair or oppressive taxation, no mere delegate of Congress could aspire to exercise the power to tax in a manner qualitatively similar to Congress. The Court in *National Cable Television Association*, familiar with the Framers' design, may have been suggesting, therefore, that considerations of institutional competence would prevent Congress from constitutionally delegating the power to impose taxes to anyone and at all.

J. Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326 (1976). See also J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 88 (1978).

5. With Section 7005 of COBRA Congress has authorized DOT to make the decisions respecting taxes—who is to be taxed and at what rate—that the constitutional text confers upon Congress. Whether the Constitution requires that the taxing power be wholly and exclusively exercised by Congress or merely that Congress delineate with particularity the basis upon which the agency shall exercise its delegated authority is unnecessary to decide here. Under either view, this delegation is invalid.

a. Initially, it needs to be emphasized what Section 7005 is *not*. It is not, as the Government apparently concedes, a statute in which Congress has delegated to an agency traditional fee-setting authority, whereby the agency is authorized to impose fees which the agency is assigned the task of correlating with the costs it incurs in providing specific benefits to entities that request its services.¹² Cf. *National Cable*, *supra*; *New England*

¹² The Government does not contest that Section 7005 assessments do not meet the definition of a “fee” as set forth in *National Cable*. Rather, the Government invites the Court to harken back to the *Head Money Cases*, 112 U.S. 580 (1884), in order to reach the conclusion that what is at issue here are fees. See Jurisdictional Statement at 13-14. The relevance of these cases to the issue presented by this appeal is, at the very least, attenuated. Their focus is the problem of differentiating between congressional action taken pursuant to the Commerce Clause and congressional exercises of the Taxing Power. The cases and their progeny hold that Congress need not comply with the requirements of the Constitution pertaining to taxation, (art. I, §§ 7 and 8), every time it seeks to impose penalties or assessments as an incident to regulation of commerce. See, e.g., *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943).

Assuming the relevance of the standard set forth in these cases, however, they only confirm that Section 7005 assessments are taxes. The test set forth in this line of cases for distinguishing between

Power, supra. Mid-America has requested no service from DOT in exchange for which Section 7005 assessments are being charged.¹³ The entities that DOT regulates pursuant to its pipeline regulatory programs are not dependent in any way on the agency for permission to operate or conduct their businesses. Rather, Section 7005 assessments have been involuntarily imposed on Mid-America, and other pipelines, irrespective of whether the pipelines have sought to avail themselves of any service, filed any papers, or submitted any applications to DOT.

Section 7005 is also not in the mold of a revenue-raising statute in which Congress itself sets the tax,¹⁴ fee,¹⁵ or duty,¹⁶ subject only to later adjustment by a

exercises of the commerce and taxing power is whether the primary purpose of the statute involved is to regulate or to raise revenue. See, e.g., *Brock v. WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 1887 (1987). Section 7005's express and exclusive purpose is to raise revenue, and the point of imposing these assessments is not a regulatory one (for example, to encourage or discourage certain forms of economic activity) but strictly fiscal.

¹³ This was perhaps the central defining characteristic of a "fee" as defined by the Court in *National Cable*:

A fee is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

415 U.S. at 341.

¹⁴ Cf., e.g., *Massachusetts v. United States*, 435 U.S. 444 (1978) (the Airport and Airway Revenue Act of 1972).

¹⁵ Cf., e.g., COBRA §§ 5002(e), (f), 100 Stat. 118-21 (establishing a statutory Schedule of Charges for implementation by the FCC).

¹⁶ Cf., e.g., *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), discussed *infra* at 18-19.

delegate in light of changing circumstances and according to specific guidelines or preconditions delineated by Congress.

b. By contrast, Section 7005 authorizes the agency to (1) fund itself so as to become economically self-sustaining in administering its pipeline regulatory programs and (2) to accomplish this by determining on its own the most appropriate basis on which to assess the industry it regulates. In the House Report accompanying the Act, Congress acknowledged the considerable latitude given DOT in selecting a taxing formula:

Because the costs of administering DOT's program are shared by the entire pipeline industry, some reasonably equitable formula for spelling out each pipeline's portion of those total costs has to be selected by the Secretary.

This subsection specifies that the formula must be "reasonable," and gives the Secretary discretion to select among several different approaches for allocating total costs fairly among the various pipelines.

H.R. Rep. No. 300, 99th Cong. 1st Sess. 497 (1985) (emphasis added).

As the foregoing legislative history makes clear, the criteria offered to the Secretary in the statute—"volume-miles, miles, revenues, or an appropriate combination thereof"—do little to contain his discretion. Indeed, these factors are merely representative of the traditional bases upon which Congress taxes: property and income. See *National Cable*, 415 U.S. at 340. To instruct the Secretary to devise some "reasonable" formula¹⁷ based upon any "appropriate" combination of these factors simply

¹⁷ The direction that a tax formula be reasonable is no direction at all. One would assume the Secretary would know he was required to be reasonable without being so told.

does not confine the delegate's range of discretion in any significant respect.¹⁸

6. For two reasons, the Court's decision in *J. W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), does not "foreclose," as the Government insists, the principle that the taxing power "is treated differently from other powers when deciding whether a statute represents an unconstitutional delegation." Jurisdictional Statement at 11. First, the Court in *National Cable* reserved the possibility that either *Hampton* or the more rigorous requirements of *Schechter* might guide constitutional resolution of the delegation question. Thus, the Court expressly left open the possibility that the appropriate analysis in evaluating delegations of taxing authority should involve the more demanding standards applied in *Schechter*.

Second, the district court was in any event correct in its construction of *Hampton*. The statute at issue in *Hampton*—Section 315 of Title III of the Tariff Act of September 21, 1922—aptly illustrates the distinction between delegating the taxing power (i.e., as a legislative function), on the one hand, and responsibility for administering a Congressionally-made assessment program, on the other. In the Tariff Act, Congress itself initially set specific duties to be imposed on various categories of imported merchandise. What was delegated to the President in Section 315 was the task of adjusting these duties

¹⁸ The chart accompanying Magistrate Wagner's Findings and Recommendations is illustrative of this range of discretion. See Appendix to Jurisdictional Statement at 12a-13a. The Government is, incidentally, incorrect in asserting that this chart is from "an exhibit used by appellee that had in fact been ruled inadmissible." Jurisdictional Statement at 6 n.4. Although Mid-America did utilize a similar chart which was ruled inadmissible, this one was in fact prepared by the Magistrate using data from official federal reports (FERC Form 6). In any event, the Government's apparent evidentiary objection to reliance on these figures is misdirected since the chart is merely intended to be exemplary of the discretion afforded DOT under Section 7005. Whether the figures used are actual or hypothetical is beside the point.

in light of changing circumstances so as to maintain and equalize the differences that arose between the costs of producing at home and in foreign countries the types of goods and articles to which such duties applied, thus effectuating standards that Congress had established with clarity.¹⁹ By contrast, in Section 7005, Congress has itself made no specific taxing determinations at all other than to say that "some reasonably equitable formula for spelling out each pipeline's portion of those total costs has to be selected by the Secretary." H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985).

CONCLUSION

The judgment of the district court should be affirmed, or in light of the fact that the federal question presented here is substantial in the jurisdictional sense, the Court should note probable jurisdiction.

Respectfully submitted,

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¹⁹ In fact, *Hampton* did not involve taxation *per se* but rather the regulation of *foreign commerce*, and thus the Executive Branch's independent but overlapping authority over matters of foreign policy. The Court has long upheld the legitimacy of what otherwise might be overly broad delegations of congressional power to executive officials in the special context of joint congressional-executive exercise of foreign affairs powers. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").